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ANALYSIS OF THE REGULATION OF BEACHFRONT DEVELOPMENT IN SOUTH CAROLINA

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I. INTRODUCTION

Counties and municipalities typically regulate real estate development in South Carolina. Counties and municipalities develop and implement zoning and land use planning schemes that control building height, density, and other aspects of development on private property.[1] Regulation of development, or zoning, is founded upon the police power. Regulation is designed to protect the public health, safety, and welfare.[2]

Police power is exercised in two ways. First, the power of eminent domain authorizes the government to purchase private property for public use.[3] Second, police power regulations provide other public benefits that are derived by controlling the use of private property rather than purchasing the property.[4] If regulation of private property deprives the owner of all beneficial uses, however, then a compensable taking may occur.[5]

In South Carolina regulation of beachfront development at the state level began in September 1977 with the passage of the South Carolina Coastal Management Act (Act).[6] The Act included "beaches" and "primary ocean front sand dunes" as "critical areas"[7] subject to direct permitting requirements.[8] These areas were quite small, however, and included only fragile natural resources. Sand dunes were protected from alterations other than construction of elevated walkways for

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1. S.C. CODE ANN. § 6-7-710 (Law. Co-op. Supp. 1990).
2. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
3. *See* Karesh v. City Council, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978).
4. *See* Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963), *appeal dismissed*, 378 U.S. 581 (1964).
5. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
6. *See* S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. 1976).
7. *Id.* § 48-39-10(J).
8. *Id.* § 48-39-130.

beach access purposes.[9] Beaches were less protected from alterations because nourishment projects, sand scraping, and erosion control structures were allowed.[10]

The Coastal Council regulated the location of the critical area line on the beach and dunes.[11] However, these natural resources were subject to change from storms, high tides, and other shoreline processes. This meant that the critical area line could and did move, sometimes rapidly. The beachfront critical area line was determined by locating one of four possible locations on a particular beach or sand dune. These locations were: (a) the highest uprush of the waves if no primary oceanfront sand dune existed and no maritime vegetation was present, (b) the landward trough of the primary front row sand dune if the crest of that dune was within two hundred feet of the mean high water mark, (c) the seaward side of any maritime forest or other nonshore vegetation if such vegetation was reached before the primary front row sand dune, or (d) the seaward side of any permanent man-made structure.[12] Where there was no existing erosion control structure, and neither a primary oceanfront sand dune nor vegetation was within two hundred feet of the mean high water mark, the highest uprush of the waves, or high tide line, limited the Coastal Council's jurisdiction along the Atlantic Ocean. Using these criteria, council employees determined the location of the critical area line.

As a result of these definitions, the beach critical area line was set at either the high tide line erosional escarpment, or the edge of nonshore vegetation; the trough of the largest dune; the upper edge of a revetment; or the face of a seawall. A Coastal Council employee established the critical area line for each individual property owner on a case-by-case basis. Because areas without erosion control structures changed, different critical area lines could be established for the same property at different points in time. The 1977 Act established no fixed lines in the sand.

Section 48-39-120[13] and regulation 30-13[14] permitted erosion control structures to be constructed on the beach. Until 1987 the Coastal Council routinely issued permits for erosion control structures on the beach. The controlling regulation 30-13(A)(1)(g) stated:

> Erosion control structures should not normally be approved except when erosion imminently threatens permanent improvements, includ-

9. *Id.* § 48-39-130(D)(5).
10. *See* S.C. CODE REGS. 30-13 (1976).
11. *See id.* 30-1(C)(2), (12), -10(B).
12. *Id.*
13. S.C. CODE ANN. § 48-39-120 (Law. Co-op. 1976).
14. S.C. CODE REGS. 30-13 (1976).

ing but not limited to buildings, paved parking lots, swimming pools, etc., which existed on the subject property 90 days after adoption of this regulation; or, in the case of protecting property adjacent to existing erosion control structures; or, in the case of structures specifically called for in an approved erosion control plan.[15]

The Coastal Council's requirements for erosion control structure permits were more lenient prior to this regulation. This regulation purported to prohibit erosion control structures. However, approval of the structures continued under the second exception of the regulation. This exception allowed construction of erosion control structures to protect property adjacent to existing erosion control structures. As a result of this exception, erosion control structures proliferated wherever erosion threatened permanent improvements.

Because of the winter storms of December 1986 and the syzygy[16] of January 1, 1987,[17] the Coastal Council stiffened its standards for approval of erosion control structures. The Council interpreted the "imminently threatens" language of the regulation[18] to prohibit erosion control structures except when the ocean reaches within ten feet of the foundation of a habitable structure.[19] Under the Council's new interpretation, a sea wall on the beach could not be rebuilt at its original site if it were destroyed. The property owner could rebuild the wall; however, the new wall had to be built within ten feet of the property owner's house. Following the 1986 and 1987 winter storms, property owners could only construct revetments; vertical seawalls were prohibited.[20]

Several factors caused the Coastal Council to stiffen its standards concerning permits for erosion control structures. One factor was the proliferation of seawalls under its prior policy. A second factor was the increasing awareness that vertical seawalls accelerate the erosion of the beach by lowering the beach face in front of the walls. Finally, the reg-

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15. *Id.* 30-13(A)(1)(g).

16. Syzygy is the nearly straight-line configuration of three celestial bodies (e.g., the Sun, Moon, and Earth during a solar or lunar eclipse) in a gravitational system. WEBSTER'S NEW COLLEGIATE DICTIONARY 1199 (9th ed. 1986).

17. These events caused significant damages to sea walls, buildings, and pools even though hurricane forces were not involved. Concern over improvements located too close to the beach, which could be subject to such damage, was a significant factor in the change in Council policy.

18. S.C. CODE REGS. 30-13(A)(1)(g) (1976).

19. The Coastal Council Permitting Committee adopted this guideline. The Committee adopted ten feet as the proper measurement after the original proposal of three to five feet was determined to cause problems with the stability of structural foundations.

20. The Coastal Council Permitting Committee adopted the policy of providing erosion relief only with sloping structures because of the perceived problems caused by vertical structures, such as lowering of the public beach.

ulation offered no logical end to the proliferation of seawalls.[21]

In 1987 the Coastal Council formed a Blue Ribbon Committee[22] to study erosion control and make recommendations to the Council. Motivated by an awareness that erosion control structures accelerate beach erosion, the Blue Ribbon Committee focused primarily on prohibiting new erosion control structures.

The Council was concerned with not allowing future development in areas vulnerable to erosion. Under the 1977 Act, the Council could establish critical area lines for eroding areas where the primary sand dune was destroyed only at the high tide line.[23] Developers frequently would construct multistory hotels or condominiums one foot behind this critical area line. The developers would submit a permit application for an erosion control structure within the first year, or sometimes within the first month, after construction began. The developers' actions caused grave public concern for the future of South Carolina's public beaches and corresponding tourism revenue. The Blue Ribbon Committee responded by recommending a setback program which would move development back from the beach.[24] By keeping development back, the natural erosion cycle could move the shoreline without causing significant property damage.

The Blue Ribbon Committee further recommended that the Coastal Council's jurisdiction be expanded. The Committee recommended that the Council be given the authority to regulate development not only on the dunes themselves, but on the land behind the dunes as well. Although such a proposal was a radical departure from existing South Carolina policy, the Coastal Council adopted the recommendation and sent it to the state legislature.

Before the legislature could respond to the proposal, however, the Council expanded its own power through its permit system by setting its jurisdictional beach critical area line as far landward as possible, especially after storm events. The Council's old standards for granting erosion control structure permits had resulted in numerous appeals of decisions before the Council; nevertheless, no significant beach-related court actions took place until the Council stiffened its position concerning erosion control structures in response to the winter storms of December 1986 and January 1987. Several court actions were filed following the Council's response to the storms, but all of the actions were

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21. *See* S.C. CODE REGS. 30-13 (1976).

22. Coastal Council Chairman Sen. James M. Waddell, Jr. appointed twenty-five committee members from a variety of backgrounds to develop recommendations to aid the Council in its management of South Carolina's coastal resources.

23. *See supra* text accompanying note 12.

24. *See* SOUTH CAROLINA COASTAL COUNCIL, COASTAL COUNCIL EROSION CONTROL BLUE RIBBON COMMITTEE REPORT (March 1987).

settled when the Council allowed the rebuilding of the damaged structures under the condition that sand was placed on the beach in front of the structures on an annual basis.[25]

Unless property owners sued, however, the Coastal Council prevented the owners from rebuilding erosion control structures as they had previously existed. The Council used the ten-foot "imminently threatening" definition to determine where revetments could be rebuilt.[26] To make its permit decisions, the Coastal Council used the underlying premise that the critical area line moved landward because of the destruction of an erosion control structure. This premise was indirectly challenged in litigation, but the courts never addressed the issue.

The new critical line that the Council mandated was located at the high tide line resulting from the storms. The setting of the new line effectively expanded the area under the Council's permitting authority. In situations in which the new critical area line intersected a building, pool, or other development, the Council extended its jurisdiction to include the entire affected structure.[27] The Council's new stiffer standards then foreclosed any possibility of a permit to rebuild in the "new" jurisdictional area. This overnight expansion of the Coastal Council's jurisdiction into privately developed areas caused some contention. The Council's actions never were tested on the merits, however, because all challenges were settled.[28]

However, *Beard v. South Carolina Coastal Council*[29] is an example of a case that did not settle. *Beard* was somewhat different from the other cases because the Coastal Council denied the property owners, Robert and Alice Beard, permission to build new vertical seawalls on their own property. The Beards' property consisted of four contiguous lots in North Myrtle Beach. Three of the four lots had seawalls some distance inland from the Beards' beachfront property line. The Beards requested permission to build new seawalls on the beachfront property line of all four lots. After the Council denied the application, the Beards sued and alleged that the Council's denial of the permit constituted an impermissible taking of the land between the existing seawalls and the beachfront property line.[30] Judge James E. Moore

25. *See* Afterdeck Homeowners Ass'n v. South Carolina Coastal Council, No. 87-CP-26-1477 (S.C. Ct. C.P. Oct. 15, 1987) (unpublished order of settlement agreement between the parties recorded in Horry County).

26. *See supra* text accompanying note 15.

27. *See* Afterdeck Homeowners Ass'n v. South Carolina Coastal Council, No. 87-CP-26-1477 (S.C. Ct. C.P. June 1, 1987) (unpublished order for a temporary injunction recorded in Horry County).

28. *Id.*

29. No. 88-CP-26-3503 (S.C. Ct. C.P. filed Sept. 30, 1988).

30. The Beards first exhausted their administrative remedies by appealing the de-

held that the Council had the authority to regulate the area, but that the regulation was a taking in this case.[31] The Coastal Council appealed this ruling.[32]

Beard is distinguishable from *Carter v. South Carolina Coastal Council.*[33] In *Carter* the supreme court held that denial of a permit to fill a wetland was not a taking in the constitutional sense.[34] The wetland in *Carter* was a high marsh,[35] which supported salt tolerant species of plants. The Coastal Council denied the owner's proposal to fill the wetland so that he could build a house. The court determined that:

> While unquestionably respondent's wetland would have greater value to him if it were filled, "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[36]

The question in *Beard* was whether the sandy area between the Beards' old walls and the proposed new walls fell within the *Carter* principle of being unsuited in its natural state for man-made alteration, and whether such an alteration would harm the rights of others.[37] In *Beard* the area seaward of the old wooden seawalls was barren at the time of the permit decision, administrative appeal, and court action. The area was subject only to storm-driven waves. Post-Hurricane Hugo conditions are unknown and the court did not consider them on appeal.[38] The area in question was accreting and not eroding, according

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nial directly to the South Carolina Coastal Council in April 1987. The agency made its final decision in September 1988. The Beards then sued in the Horry County Circuit Court on September 30, 1988. *Id.*

31. *Id.*

32. *See* Beard v. South Carolina Coastal Council, ___ S.C. ___, 403 S.E.2d 620 (overturning Judge Moore and finding that the lower court's failure to challenge the legislature's findings and policies in the Coastal Zone Management Act and its finding that a "substantial and legitimate state interest" was involved, was a concession that regulation of the property was necessary to protect against serious public harm), *petition for cert. filed*, 60 U.S.L.W. 3083 (U.S. July 16, 1991) (No. 91-137).

33. 281 S.C. 201, 314 S.E.2d 327 (1984).

34. *Id.* at 204, 314 S.E.2d at 329.

35. A high marsh is one located above the mean high water mark. Because the State claims title to property below the mean high water mark, purely private property can be regulated under *Carter* to the point that it will not be used except in its natural state.

36. *Carter*, 281 S.C. at 205, 314 S.E.2d at 329 (quoting Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972)).

37. Beard v. South Carolina Coastal Council, No. 88-CP-26-3503 (S.C. Ct. C.P. filed Sept. 30, 1988). Although the lower court did not focus on this question, the supreme court believed it was pivotal.

38. Hurricane Hugo slammed into South Carolina's coast on September 21, 1989. Hurricane Hugo was the largest hurricane to strike the South Carolina coast since Hurri-

to the South Carolina Coastal Council.[39] The property was adjacent to a public beach,[40] and the new seawall would have kept the public off the Beards' property seaward of the old seawall to the property line.[41] This is noteworthy because of the dynamic tension between the public and private rights along South Carolina's beaches.

Public access to and use of the beach is only one part of this tension. Also important is the private property interest and use of the area seaward of the owner's old seawall. The public interest issue stems from the potentially negative impact that some uses of this area might have on the adjacent public beach. Judge Moore stated in *Beard* that the Coastal Council used the public access argument almost exclusively in its decision to deny the permit.[42] The order does not reveal whether Judge Moore would have ruled differently if he had found that a public harm was being prevented, rather than that a public benefit was being conferred in the form of a public access over private property. The South Carolina Supreme Court appears to have determined that serious public harm would result from issuing the permit, thus justifying its ruling that no taking occurred. This decision has been appealed to the United States Supreme Court.[43]

II. The Beach Management Act

A complex and controversial amendment to the Coastal Zone Management Act became effective in July 1988. The Beach Management Act[44] (Act) established a setback program for South Carolina's Atlantic shoreline.[45] The program expanded the jurisdiction and regulatory authority of the Coastal Council by enabling the Council to regulate comprehensively an area that was not a natural resource per se.

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cane Hazel in 1954.

39. The Council denied the permit in part because an erosion control structure was not needed on the accreting beach. Accretion is the buildup of sand on the beach, rather than the erosion away of sand. If a beach is accreting, generally no seawall is needed.

40. In South Carolina the area below the mean high water line is public beach under the public trust doctrine. Currently, no modern South Carolina cases exist that pertain to the doctrine. Following the Supreme Court's decision in Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988), the South Carolina Supreme Court had the opportunity to determine whether the mean high tide mark remains the modern measure for the public trust doctrine. The court did not mention the doctrine in *Beard*.

41. Beard v. South Carolina Coastal Council, No. 88-CP-26-3503 (S.C. Ct. C.P. filed Sept. 30, 1988).

42. *Id.*

43. Beard v. South Carolina Coastal Council, ___ S.C. ___, 403 S.E.2d 620, *petition for cert. filed*, 60 U.S.L.W. 3083 (U.S. July 16 1991) (No. 91-137).

44. S.C. Code Ann. §§ 48-39-270 to -360 (Law. Co-op. Supp. 1990).

45. *Id.* § 48-39-280.

The setback area need not be a wetland, a sand dune, or a beach area to fall under Coastal Council jurisdiction. The new beach and dune critical area is determined by projecting the eventual location of the beach and dunes, rather than by determining their current location.[46] This fundamental change in the Act led to a zoning-type program that required expanded regulatory expertise by the Council. The Council's discretion, however, is severely constrained by the Act's prohibitions and specific requirements.[47]

The Coastal Council's new jurisdiction encompasses two types of zones: standard erosion zones and inlet erosion zones. The standard erosion zone is a segment of shoreline that is subject to essentially the same set of coastal processes and is not directly influenced by tidal inlets or associated inlet shoals.[48] An inlet erosion zone is a segment of shoreline along or adjacent to a tidal inlet that is directly influenced by the inlet and the inlet's associated shoals.[49] The Act describes the establishment of the baseline in each zone.[50] The baseline in the standard erosion zone is "the location of the crest of the primary ocean front sand dune in that zone."[51] If erosion control structures or other human actions have altered the shoreline, then the baseline is "where the crest of the primary ocean front sand dunes for that zone would be located if the shoreline had not been altered."[52]

Where inlets are not stabilized by a jetty or other structures, the inlet erosion zone baseline has become the most landward position of the shoreline during the past forty years.[53] If a scientific study shows that the shoreline is unlikely to return to its former position, the Act does not specify where the baseline should be established.[54] If a study is made, the Act mandates that the study must be part of the State Comprehensive Beach Management Plan.[55] The Act lists many components that must be considered in order for the study to be complete.[56]

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46. *See id.* § 48-39-280(A)(1)-(3). The 1990 amendments make some clarifying changes to these sections. The existing forty-year-setback requirement remains.

47. *See, e.g., id.* §§ 48-39-290(B)-(C), -300 (Law. Co-op. Supp. 1989).

48. *Id.* § 48-39-270(6) (Law. Co-op. Supp. 1990).

49. *Id.* § 48-39-270(7).

50. The baseline is the line from which the forty-year-setback line is measured.

51. S.C. CODE ANN. § 48-39-280(A)(1) (Law. Co-op. Supp. 1990).

52. *Id.*

53. *Id.* § 48-39-280(A)(2).

54. *Id.*

55. *Id.*

56. The study, to be completed as part of the State Comprehensive Beach Management Plan, must consider, for example, "historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets." *Id.*

If an inlet is stabilized by a jetty or other structure, then the baseline is established using the method described for standard erosion zones with the condition that the actual crest of the dune be used, not the projected location of the dune, regardless of the stabilizing structure.[57]

Several problems arise under the statutory scheme. First, not all stabilized inlet zones have primary oceanfront sand dunes.[58] It is very difficult, if not impossible, to establish a baseline when there is not an "actual" primary oceanfront sand dune in a stabilized inlet zone. In these situations, a baseline has been established by projecting where the crest of a dune should be, based on the presence of the stabilizing structure.

Establishing baselines for zones that are severely eroded and for inlet zones that are significantly accreted is also difficult. Because the most landward historical position of the shoreline in a severely eroded area is the current shoreline, the Act allows construction closer to the public beach in eroded areas than it permits in accreting inlet zones. The baseline for accreting areas sets development further from the beach, because the forty-year historical shoreline is inland of the current shoreline. This illogical result can be avoided only by conducting a detailed historical and scientific study to show that the baseline should be closer to the sea in accreting areas. It is not likely that such a study will be conducted, however, to show that the baseline of a severely eroding shoreline should be moved inland.

The 1988 Act required the Coastal Council to establish an "interim" baseline and setback line by the Act's effective date.[59] This compelled the Coastal Council to summarize available data quickly and adopt the baseline, setback line, and erosion rates before the Act's effective date.[60] Property owners may challenge interim lines and erosion rates, as well as the lines and rates adopted as part of the State Comprehensive Beach Management Plan. The 1988 Act provided that "[a]ny coastal riparian landowner adversely affected . . . must be

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57. *Id.* § 48-39-280(A)(3).

58. All of South Carolina's beaches from Charleston to Little River lost their dunes during Hurricane Hugo. Only man-made dunes exist in this area now, and they may not be in the location of the lost dunes. The Council will be required to interpret the Act if stabilized inlet zone baseline determinations are challenged.

59. S.C. CODE ANN. § 48-39-280(C) (Law. Co-op. Supp. 1989). This section also required that the lines be revised every five to ten years, but the Act prohibited moving the line seaward after July 1, 1990. *Id.* The 1990 amendments delete the prohibition on moving the line seaward, set July 3, 1991 as the date for adoption of a final line, and change the revision period to require that the lines be revised every eight to ten years. *See id.* § 43-39-280(C) (Law. Co-op. Supp. 1990).

60. The Coastal Council adopted these items on June 17, 1988 with the provision that they were to become effective on July 1, 1988. *See* S.C. COASTAL COUNCIL, MEETING MINUTES (June 17, 1988).

granted a review of the setback line, baseline, or erosion rate" upon submission of substantiating evidence.[61] The 1990 amendment allows parties to appeal if they are "[a] landowner claiming ownership of property affected."[62] Parties may appeal to the full Coastal Council, and they may appeal the Council's decision to the courts.[63] A significant change in the 1990 amendments is that a party may challenge only the final and revised lines under subsection 280(E).[64] The provisions of section 8 of Act 60,[65] however, may allow parties to pursue challenges that already have been filed or that could have been filed under previous law, in spite of the amendment to subsection 280(E). The interim baselines at many locations have been revised at least once during the first eighteen months since the Act's adoption. The final lines were adopted by the Council in June 1991.[66]

The dynamics of the beach system still can play a significant part in any particular line review. For instance, the Coastal Council surveyed the affected beaches immediately after Hurricane Hugo. If the Council used the Hugo data in reviewing the interim baselines prior to establishing final lines, the resulting baselines would be sited further inland. The Coastal Council did not use the Hugo data for establishing baselines, however, because the Act requires the use of forty years of data to establish the new jurisdictional area.[67] The Coastal Council established baselines and erosion rates by reviewing available aerial photography and by measuring the erosion or accretion of the shoreline. A certain degree of professional judgment must be used to determine the erosion rate and baselines because the aerial photographs the engineers used were not taken for this purpose. None of the photographs used prior to July 1988 were even digitized or rectified.

Improved photographic technology will lead to a more precise measurement of the setback line, which is currently figured by multiplying the annual erosion rate by forty.[68] The Act requires that a minimum twenty-foot-setback line be established "even in cases where the shoreline has been stable or has experienced net accretion over the

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61. S.C. CODE ANN. § 48-39-280(E) (Law. Co-op. Supp. 1989).

62. *Id.* (Law. Co-op. Supp. 1990).

63. S.C. CODE REGS. 30-6, -7 (1976 & Supp. 1990).

64. *Compare* S.C. CODE ANN. § 48-39-280(E) (Law. Co-op. Supp. 1990) *with id.* (Law. Co-op. Supp. 1989).

65. This is an uncodified provision of the 1990 amendments to the Beach Management Act. *See* 1990 S.C. Acts 607.

66. *See* S.C. COASTAL COUNCIL, MEETING MINUTES (July 1988-June 1991).

67. *See* S.C. CODE ANN. § 48-39-280(A) (Law. Co-op. Supp. 1990). The Council recently confirmed that it did not use Hugo data to review interim baselines or establish final ones. Telephone interview with Deborah Hernandez, Coastal Council Staff Engineer (July 22, 1991).

68. S.C. CODE ANN. § 48-39-280(B) (Law. Co-op. Supp. 1990).

past forty years."[69] This minimum setback line figures prominently in the regulatory scheme described in the Act and is a good example of the nondiscretionary requirements contained in the Act. Until the adoption of the 1990 amendment, no new construction or reconstruction was allowed in this setback, with the exception of beach access structures.[70]

III. PROPERTY TRANSFER RESTRICTIONS

In addition to severely limiting the discretion of the Coastal Council, the Act also contains a mandate for beachfront property owners and others associated with real estate transactions that involve beachfront property. South Carolina Code section 48-39-330 requires that any contract of sale and any deed for transfers of real property located wholly or partially seaward of the setback line must contain a disclosure statement "reasonably calculated to call attention to the existence" of the Act's impact on that particular parcel.[71]

The Code is unclear, however, about how much detail is required in the disclosure statement. The first portion of the section specifically describes the information required in a disclosure (reference to setback and baselines). The second portion of the section provides that any language reasonably calculated to call attention to the mere existence of the required information is satisfactory.[72]

Apparently, the Act requires potential sellers to disclose that the information about the setback exists, but does not require the potential sellers to reveal the actual information or its effects on the property. In practice, plats are almost always used and all of the information is incorporated by reference into the deed. Therefore, this requirement may cause individual property owners trouble because the Coastal Council is not required to notify them when it changes the interim erosion rate, the interim baseline, or the interim setback line. In fact, public notice is not required for changes in the interim lines or rates. Even though the final lines are established under the State Comprehensive Beach Management Plan, which does have public notice requirements, lawyers and property owners must contact the Coastal Council to ensure that the information they include in the required disclosure statement is accurate. Parties should check with the Coastal

69. *Id.* § 48-39-280(B)(1) (Law. Co-op. Supp. 1989). The 1990 amendment changes the language but maintains the twenty-foot minimum setback requirement. *See id.* § 48-39-280(B) (Law. Co-op. Supp. 1990).

70. *See id.* § 48-39-290(A)(6) (Law. Co-op. Supp. 1990) (allowing construction by special permit only).

71. *Id.* § 48-39-330.

72. *Id.*

Council because the setback line in some areas of the coast is several hundred feet from the shoreline and a title examiner may have no other way to determine whether the property he is researching requires a disclosure statement.

No party has actually litigated the disclosure requirement, but a failure to disclose probably would void the real estate transaction. An alternative remedy would be to reform the contract, or perhaps to submit the issue of a fair sales price to arbitration. The 1990 amendment provides "[t]he provisions of this section are regulatory in nature and do not affect the legality of an instrument violating the provisions."[73] It is unclear whether the 1990 amendment renders the requirement toothless or whether an alternative penalty for nondisclosure exists.

IV. LOCAL PLANNING REQUIREMENT

The Act also places requirements on local governments. Local governments must submit a local comprehensive beach management plan to the Coastal Council within two years of the Act's effective date.[74] If a local government fails to establish and enforce a local comprehensive beach management plan in a timely manner, the Council must impose either a local plan or the State Comprehensive Beach Management Plan for the local government. Additionally, the local government will automatically lose its eligibility to receive state money for beach protection, preservation, restoration, or enhancement.[75] To meet the Act's requirements, the local plan must be comprehensive and it must include everything from an inventory of turtle nesting and important habitats of the beach and dune system to a postdisaster plan.[76] Public access is also a significant component of the plan's requirements. Finally, the Coastal Council must develop a long-range, comprehensive beach management plan.[77]

V. BUILDING AND REBUILDING RESTRICTIONS

The 1988 Beach Management Act's most detailed, controversial, and restrictive provisions are found in sections 48-39-290 and 48-39-

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73. *Id.*

74. *Id.* § 48-39-350(A) (Law. Co-op. Supp. 1989). This section outlines the data and information that must be included in the local plan. The 1990 amendment sets July 1, 1991 as the deadline for submitting the local plan. *Id.* (Law. Co-op. Supp. 1990).

75. *Id.* § 48-39-350(B).

76. *See id.* § 48-39-350(A)(1)-(10).

77. *Id.* § 48-39-320(A). The information that must be included in the plan is similar to the information that must be included in the local plans. *See id.* § 48-39-320(A)(1)-(5).

300. These two sections prohibit construction or reconstruction of most habitable structures seaward of the setback line.[78] The building of new structures and rebuilding of structures destroyed beyond repair is not permitted seaward of the twenty-foot minimum setback line.[79] If a setback area landward of the minimum setback line is present, because of erosion greater than six inches per year, any new construction in the setback area is limited to habitable structures that are not larger than five thousand square feet.[80] The 1990 amendments removed the blanket prohibition against all construction in the minimum twenty-foot zone, but restrictions on development and rebuilding between the baseline and the setback line are still in force. Although development and rebuilding is not prohibited completely, very severe restrictions apply seaward of the baseline.[81]

The Council has determined that the Act covers an entire structure if any part of the structure is seaward of the setback line. A 10,000 square foot building, therefore, cannot be built half-in and half-out of the setback area. The Act also limits the rebuilding of existing structures to the same square footage that existed prior to any destruction of the building by natural causes or fire.[82] Additionally, the linear footage along the coast of the rebuilt structure cannot exceed the linear footage along the coast of the original structure.[83] The limitations on square footage and linear footage apply to repair work, as well as rebuilding.[84]

Under the 1988 Act, if the Council permitted an owner to rebuild a structure destroyed beyond repair within the setback area, the Council required that owner to renourish annually the beach in front of the property with an amount and type of sand to be approved by the Coastal Council. The Code required the owner to replace at least one and one-half times the volume of sand annually lost to erosion.[85] The renourishment requirement also applied to the replacement of erosion control structures.[86] The renourishment requirements did not apply, however, if the structures were landward of an active government re-

78. *See id.* §§ 48-39-290, -300.

79. *Id.* §§ 48-39-290(B), -300 (Law. Co-op. Supp. 1989).

80. *Id.* § 48-39-300. Prior to the 1990 amendments, the statute allowed construction of habitable structures in this area if there was not sufficient land to build on the lot landward of the setback line. The Code required that new construction be "as far inland as possible." *Id.*

81. *See id.* §§ 48-39-290(B)(1)(a)(ii), (B)(2)(b)(iv) (Law. Co-op. Supp. 1990).

82. *Id.* § 48-39-290(B)(1) (Law. Co-op. Supp. 1989). The 1990 amendment changed "fire" to "manmade causes." *Id.* § 48-39-290(B)(1)(b)(iii) (Law. Co-op. Supp. 1990).

83. *Id.* § 48-39-290(B)(2) (Law. Co-op. Supp. 1989).

84. *Id.* § 48-39-290(A)(1)-(2).

85. *Id.* § 48-39-290(B)(7).

86. *Id.* § 48-39-290(C).

nourishment project.[87] The 1990 amendment removed the renourishment requirement.[88]

The Beach Management Act prohibits construction of new erosion control structures seaward of the setback line.[89] Under the 1988 Act, existing erosion control structures that were more than fifty percent damaged could be rebuilt only if they protected a habitable structure and if they met the other requirements of section 48-39-290(C).[90] The statute prohibits reconstruction of a vertical structure, and no replacement device can be located further out on the beach than where the original erosion control structure was located.[91] The 1988 Act required that all vertical seawalls be replaced with sloping erosion control devices within thirty years of the effective date of the Act.[92]

VI. BEACH MANAGEMENT ACT LITIGATION

Beachfront landowners have challenged the Beach Management Act in both state and federal court. The federal court actions have challenged the constitutionality of the statute. All of the plaintiffs in pre-Hurricane Hugo actions alleged that the application of the Act was an unconstitutional taking of their property. The post-Hugo actions in state court also have alleged a taking and have focused on the loss of swimming pools and erosion control structures on developed property.

The first case filed under the Beach Management Act was *Lucas v. South Carolina Coastal Council.*[93] The case involved two undeveloped oceanfront lots in the Wild Dunes subdivision on the Isle of Palms. David H. Lucas purchased two lots in 1986, one for $475,000 and the other for $500,000.[94] Lucas argued that application of the Act was a taking of his property without just compensation because the Act prohibits any construction other than a walkway to the beach and a small

87. *See id.* §§ 48-39-290(B)(7), (C).

88. *See id.* § 48-39-290 (Law. Co-op. Supp. 1990).

89. *Id.* § 48-39-290(B)(2)(a).

90. *Id.* § 48-39-290(C) (Law. Co-op. Supp. 1989). The 1990 amendment does not allow rebuilding if more than a certain percentage of the erosion control structure is destroyed. The percentage of the structure that may be destroyed without application of the rebuilding prohibition varies depending on the structure's destruction date. The amendment prohibits rebuilding if more than 80% of the structure is destroyed prior to June 30, 1995; more than 62 ⅔% of the structure is destroyed prior to June 30, 2005; and more than 50% of the structure is destroyed after June 30, 2005. *Id.* § 48-39-290(B)(2)(b) (Law. Co-op. Supp. 1990).

91. *Id.* § 48-39-290(C)(1)-(2) (Law. Co-op. Supp. 1989).

92. *Id.* § 48-39-290(C).

93. No. 88-CP-10-66 (S.C. Ct. C.P. Aug. 7, 1989), *rev'd*, __ S.C. __, 404 S.E.2d 895 (1991).

94. *Id.*, slip op. at 1.

deck.[95] The court agreed and awarded Lucas $1,232,387.50 in compensation, plus interest until satisfaction of the judgment. The court chose this compensation amount based on the fair market value, estimated at $1,170,000, property taxes of $3,400, and simple interest on the mortgage balance of $58,987.50.[96] The South Carolina Supreme Court reversed the circuit court in February 1991.[97]

In the trial court decision, the Coastal Council asserted that no unconstitutional taking had occurred. As an affirmative defense, the Council further argued that even if application of the Act amounted to a taking, Lucas was limited to administrative relief.[98] The Council argued that there had been no taking because (1) the restriction on the use of the property merely prohibited the owner from using it in a way that would injure others; (2) the restrictions prohibited a use for which the property is not suited; and (3) the Council had not denied the plaintiff all viable economic use of the property.[99] The Council also argued that even if the court found that an unconstitutional taking had occurred, the remedy was issuance of a permit rather than compensation.[100]

To support the first argument the Coastal Council relied on historical facts about the property. Testimony from an expert in coastal processes indicated that the area had been under water in 1963.[101] According to the Coastal Council, erosion in this accreting area is episodic and occurs when inlet shoals attach to the island as part of the accretion process.[102] As the shoal, or sandbar, migrates and attaches to the island, the direction of wave attack changes in a way that severely erodes the adjacent areas on either side. Up to three hundred feet of erosion could occur very quickly in this process. The Coastal Council maintains that this process will reoccur in this area at some point in the future. The Council argued, therefore, that the area is not suitable for development because it someday will be subject to severe erosion even though the island currently is accreting.[103]

The Coastal Council's public harm argument focused on the

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95. *Id.*, slip op. at 2-3.

96. *Id.*, slip op. at 8.

97. Lucas v. South Carolina Coastal Council, ___ S.C. ___, 404 S.E.2d 895 (1991).

98. *Lucas*, No. 88-CP-10-66, slip op. at 3.

99. *See* Coastal Council Trial Memorandum at 13-14, Lucas v. South Carolina Coastal Council, No. 88-CP-10-66 (S.C. Ct. C.P. Aug. 7, 1989).

100. *Lucas*, No. 88-CP-10-66, slip op. at 3.

101. *See* Trial Transcript at 111, Lucas v. South Carolina Coastal Council, No. 88-CP-10-66 (S.C. Ct. C.P. Aug. 7, 1989) (expert testimony of Christopher Jones).

102. *See id.* at 102.

103. *See* Coastal Council Trial Memorandum at 14. Lucas v. South Carolina Coastal Council, No. 88-CP-10-66 (S.C. Ct. C.P. Aug. 7, 1989).

coastal dynamics of the Isle of Palms. The dynamics of the area eventually would cause any development to be harmed by the inevitable movement of shoals onto the island. If the development were in the active wave zone, it would harm the public beach by increasing erosion, and thereby disrupt public access to the beach.

The Coastal Council also argued that the land still had viable economic value.[104] The Council supported its argument that economic value remained in the property with testimony that the lot was worth no more than $56,000 under the Act's restrictions.[105] Nevertheless, the circuit court considered only fair market value for a totally restricted oceanfront lot as the basis for a finding that a taking had occurred.[106]

The Council predicated its argument for an alternative remedy to compensation on the original language of the Coastal Management Act.[107] Section 48-39-180 of the Act indicates that:

> If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land.[108]

Section 48-39-290(B) of the 1988 Act provides that "[i]f the judgment is in favor of petitioner, the order shall require the State to either issue the necessary permits for reconstruction of the structure or, in the alternative, to provide reasonable compensation for the loss of use of the land."[109] The 1988 Act's remedial language only applied to habitable structures destroyed beyond repair,[110] but the 1990 amendment extends this remedy to all property owners affected by the Act.[111]

The Council argued that the original remedial language of the Act found in section 48-39-180[112] should apply to prohibitions on new construction because the 1988 Act did not provide the same remedy for prohibitions on rebuilding.[113] The Council argued that the language in section 48-39-180, which provides that "a finding that the action shall

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104. *Id.* at 16.

105. *See* Trial Transcript at 148-49, Lucas v. South Carolina Coastal Council, No. 88-CP-10-66 (S.C. Ct. C.P. Aug. 7, 1989) (expert testimony of Chris Donato).

106. *See* Lucas v. South Carolina Coastal Council, No. 88-CP-10-66, slip op. at 8 (S.C. Ct. C.P. Aug. 7, 1989), *rev'd*, __ S.C. __, 404 S.E.2d 895 (1991).

107. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. 1987 & Supp. 1990).

108. *Id.* § 48-39-180 (Law. Co-op. 1987).

109. *Id.* § 48-39-290(B) (Law. Co-op. Supp. 1989).

110. *See id.*

111. *See id.* § 48-39-305 (Law. Co-op. Supp. 1990).

112. *Id.* § 48-39-180 (Law. Co-op. Supp. 1988).

113. *Id.* § 48-39-290(B) (regulates rebuilding); *id.* § 48-39-300 (regulates new construction).

not apply to the land of the plaintiff,"[114] should be equivalent to the issuance of a permit.[115] The Council's position is that if the court finds that the action does not apply to the plaintiff's land, it should require the Council to issue a permit.[116]

The Council's attorney raised the issue of an alternative remedy in *Lucas*. Although the Council briefed the issue, Judge Patterson discussed no alternative remedy in his order. Patterson's order awarded compensation to Lucas, and the alternative remedy issue became irrelevant. Because the supreme court reversed the lower court it did not reach this issue.

Even if the South Carolina Coastal Council had succeeded in forcing an alternative remedy to compensation, however, other legal issues and practical considerations would remain. A landowner may be entitled to temporary damages. The United States Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*[117] suggests that if a regulation is found to be a taking, compensation should be awarded for the period prior to the court's ultimate determination. This is true even if the regulation is voluntarily removed, or as in this case, found not to apply to the petitioner's land. Additionally, a determination that the governmental action does not apply to the petitioner's property does not mean necessarily that the Council should issue a permit to allow construction in the otherwise prohibited area.

Notwithstanding temporary damages, one may further argue that if the prohibition does not apply to the petitioner's land, the Council does not have the power to regulate the land's use. On the other hand, one could argue that the inapplicable "action" is the establishment or enforcement of the Beach Management Act's new jurisdictional area. As with the temporary damages issue, the courts have not yet had to face this issue directly.

When the court awards damages for a taking, temporary damages clearly will not be an issue. The issue of temporary damages arises only if the plaintiff gets the alternative remedy of requiring the Council to issue a permit that allows development in the otherwise prohibited area. When a court decides the temporary damages issue, as well as the issue of payment of attorney's fees, new precedent will be set in this dynamic area of regulatory law.

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114. *Id.* § 48-39-180 (Law. Co-op. 1987).

115. *See* Coastal Council Trial Memorandum at 19-20, Lucas v. South Carolina Coastal Council, No. 88-CP-10-66 (S.C. Ct. C.P. Aug. 7, 1989).

116. *Id.*

117. 482 U.S. 304 (1987).

VII. THE FEDERAL COURTS AND OTHER STATE LITIGATION

Lucas was not the only lawsuit filed in state court by a Wild Dunes landowner. A similar case, *Curry v. State*,[118] involved a lot near the ones Mr. Lucas owns. The facts of *Lucas* and *Curry* were essentially the same and, notably, Judge Patterson heard both cases.[119]

However, unlike *Lucas*, the court did directly address the issue of an alternative remedy in *Curry*. In response to the Council's argument that the plaintiff's remedy should be limited to administrative action, Judge Patterson held that "[t]he controlling Act does not indicate this to be proper under the facts of this case. Furthermore, the Constitutional provisions under which plaintiff claims, have long been held to be self-executing and do not require independent statutory authorization."[120] The judge awarded the plaintiff $677,681.94 in damages plus mortgage interest that had accrued from the date the plaintiff filed the suit.[121] The court also awarded postjudgment interest.[122]

In addition to *Curry* and *Lucas*, the Act has been litigated in the federal courts. On October 12, 1989, Judge Falcon Hawkins decided three cases concerning South Carolina's Beach Management Act.[123] The first case, *Esposito v. South Carolina Coastal Council*,[124] was a suit by twenty-five single-family lot owners on Hilton Head Island. All of the lots were developed with residential dwellings and appurtenant structures. The *Esposito* plaintiffs alleged that the Act was unconstitutional and that application of the Act resulted in a taking of their property.[125]

The second case, *Feuer v. South Carolina Coastal Council*,[126] was a suit by an owner of a Hilton Head condominium affected by the Act. *Feuer* also challenged the constitutionality of the Act and claimed that a taking had occurred.[127] The third action, *Chavous v. South Carolina*

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118. No. 89-CP-10-0076 (S.C. Ct. C.P. Feb. 6, 1990).

119. *See id.*

120. *Curry*, No. 89-CP-10-0076, slip op. at 9.

121. *Id.*, slip op. at 11.

122. *Id.*

123. Chavous v. South Carolina Coastal Council, 745 F. Supp. 1168 (D.S.C. 1989) *vacated as moot sub nom.* Esposito v. South Carolina Coastal Council, No. 89-1840 (4th Cir. July 3, 1991); Esposito v. South Carolina Coastal Council, No. D:88-2055-1 (D.S.C. Oct. 13, 1989), *aff'd*, No. 89-1840 (4th Cir. July 3, 1991); Feuer v. South Carolina Coastal Council, No. D:88-3073-1 (D.S.C. Oct. 13, 1989).

124. No. D:88-2055-1 (D.S.C. Oct. 13, 1989), *aff'd*, No. 89-1840 (4th Cir. July 3, 1991).

125. *See id.*, slip op. at 1.

126. No. D:88-3073-1 (D.S.C. Oct. 13, 1989).

127. *See id.*, slip op. at 1.

Coastal Council,[128] was a suit by the owner of an undeveloped oceanfront lot similarly situated to the lots in *Lucas* and *Curry*.[129]

In all three cases Judge Hawkins ruled that the Act was not unconstitutional on its face.[130] The Act's statutory restrictions were, according to the judge, "substantially related to the important goal of preserving South Carolina's beaches."[131] Furthermore, in *Feuer* and *Esposito* the court ruled that the plaintiffs had not suffered a taking.[132] The court found in *Feuer* and *Esposito* that the plaintiffs had suffered no concrete injury to the relevant property because of the application of the Act. The court found:

> [W]hile it is undisputed that the plaintiffs' homes are located within this no construction zone, there is no evidence indicating that any of them has been denied permission to build, or rebuild, any structure or recreational amenity within this area. Additionally, although the record contains evidence that several of the plaintiffs have been unable to sell their homes, that situation is not the result of any direct restriction on alienability contained in the statutes. Rather, this situation is the result of a chilling effect on the real estate market caused by the enactment of the statutes.[133]

In *Chavous* Judge Hawkins found that, as applied to the plaintiffs, the Act effected a taking.[134] Even though the plaintiffs had not petitioned for a change in the jurisdictional lines, the court held that such a request would have been futile.[135] The court also noted that the availability of an inverse condemnation action in state court is uncertain.[136] Thus the issue was ripe for resolution. The court also stated that it was "immediately apparent that the plaintiffs [had] demonstrated an economic injury sufficient to invoke the protection of the takings clause."[137] The court distinguished a facial challenge from a challenge to the enforcement of a statute and focused entirely on the economic impact of the specific applications of the Act to the Chavous

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128. No. D: 89-0216-1 (D.S.C. Oct. 13, 1989).

129. *See* Chavous v. South Carolina Coastal Council, 745 F. Supp. 1168, 1169 (D.S.C. 1990) (the lot was similar because it was an undeveloped oceanfront lot), *vacated as moot sub nom.* Esposito v. South Carolina Coastal Council, No. 89-1840 (4th Cir. July 3, 1991).

130. *See Chavous*, 745 F. Supp. at 1170-71; *Esposito*, No. D:88-2055-1, slip op. at 4, 8; *Feuer*, No. D:88-3073-1, slip op. at 4, 7-8.

131. *Esposito*, No. D::88-2055-1, slip op. at 4; *Feuer*, No. D:88-3 703-1, slip op. at 4.

132. *Esposito*, No. D:88-2055-1, slip op. at 4; *Feuer*, No. D:88-3073-1, slip op. at 4.

133. *Esposito*, No. D:88-2055-1, slip op. at 6 (citations omitted); *see also Feuer*, No. D:88-3073-1, slip op. at 6 (substantially similar language).

134. *Chavous*, 745 F. Supp. at 1170-71.

135. *Id.*

136. *Id.*

137. *Id.*

property.[138] Under the Act the plaintiffs could build only a small deck or a walkway to the beach on their property. Because the plaintiffs' options were so limited, the court held that no remaining economically viable use existed for the property.[139]

After the court ordered that a taking had occurred, the court held a hearing on damages.[140] At the hearing the Coastal Council argued that a mere injunction would be an appropriate remedy and also vigorously argued that the court could consider only the fair market value of the property and property taxes for money damages.[141] The plaintiffs sought compensation for the value of the property as shown by their expenses to purchase and maintain it. They also sought prospective relief for the loss of rental income. Judge Hawkins ruled in favor of the Coastal Council and limited the plaintiffs' recovery to prospective injunctive relief. The court found that the State of South Carolina had not waived its immunity under the Eleventh Amendment to the United States Constitution. A federal court, therefore, could not award money damages.[142]

However, the Fourth Circuit Court of Appeals recently has affirmed *Esposito*[143] and vacated the judgment in *Chavous* with instructions on remand to dismiss the case as moot. The Fourth Circuit found that the 1990 amendments to the Act were significant and made the contest of the 1988 Act moot. The Fourth Circuit also ruled that it had no jurisdiction over the damages claim since the district court's ruling that the Eleventh Amendment barred payment of damages was not appealed. Since the injunctive relief ordered by the district court was moot, the Fourth Circuit expressed no opinion on the district court's determination that the 1988 Act effected a taking of the Chavous's property. The Fourth Circuit addressed the constitutionality of the Act in *Esposito* and found that the stated purpose of the General Assembly to "protect, preserve, restore, and enhance the beach/dune system constituted a legitimate State interest and exercise of the police power of the State."[144] This finding was analogized to a similar finding in *Keystone v. Bituminous Coal Ass'n v. DeBenedictis*[145] and, in a footnote, the Fourth Circuit noted that the South Carolina Supreme Court had relied upon *Keystone* in deciding in *Lucas* that no taking had oc-

138. *Id.*

139. *Id.* at 1170. The court also noted that the property previously had been very valuable. *Id.*

140. *See id.* (order resulting from damages hearing on January 23, 1990).

141. *See id.* at 1170.

142. *Id.* at 1170-72.

143. Esposito v. South Carolina Coastal Council, No. 89-1840 (4th Cir. July 3, 1991).

144. *Id.*, slip op. at 7.

145. 480 U.S. 470 (1982).

curred. Thus, the Fourth Circuit found under a *Keystone* analysis that the Act substantially advanced legitimate state interests.[146]

Also, the Fourth Circuit agreed with the district court that the Act did not deny plaintiffs the viable economic use of their property. The possible reduction of value or of market attractiveness was addressed, but rejected as insufficient to find a taking. The *Esposito* plaintiffs' due process claim was also rejected because of the court's finding that the 1988 Act was substantially related to the legitimate state interests in protecting its beaches.[147]

VIII. THE TAKING ANALYSIS

The legal argument that not all viable economic use of property is destroyed when all practical use is prohibited is found in a line of cases concerning regulatory takings, which culminates with *Florida Rock Industries, Inc. v. United States*.[148] In *Florida Rock* the United States Army Corps of Engineers denied a phosphate mining permit application in Florida.[149] The claims court decided that the government's action denied the plaintiff all economic use of the land, and this amounted to a taking.[150] In overturning the claims court, the Court of Appeals for the Federal Circuit reasoned that a "market made up of investors who are real but speculating in whole or major part" would provide sufficient remaining use to prevent the finding that a taking occurred.[151] Judge Patterson found no such remaining use in *Lucas*.[152]

Federal courts seldom find a taking when there is government regulation. The relatively few decided cases do not provide a specific formula for determining when a taking occurs.[153] The legal tests in a taking analysis include a due process review to determine whether the regulation reasonably advances a legitimate state interest and, more fundamentally, a determination of whether all economically viable use of the property has been prohibited.[154] As with the Beach Management

146. *Esposito*, No. 89-1840, slip op. at 7.

147. *Id.*

148. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

149. *Id.* at 895-96.

150. *Id.* at 897.

151. *Id.* at 903.

152. *See* Lucas v. South Carolina Coastal Council, No. 88-CP-10-66, slip op. at 7 (S.C. Ct. C.P. Aug. 7, 1989) ("It is manifest that the South Carolina Coastal Council in its enforcement of the Beach Management Act, has deprived Lucas of all of the essential elements of ownership."), *rev'd*, __ S.C. __, 404 S.E.2d 895 (1991).

153. The Supreme Court, instead, has chosen to base its decisions on ad hoc factual inquiries. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

154. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485

Act, legitimate state interests may be advanced by the government regulation. Nonetheless, when applied to particular situations, an individual may bear a significant loss.

Courts must also review whether the burden of the regulation is "borne by the public as a whole."[155] The Court has yet to state what is fair by this standard. The inquiry would seem to require a balancing of the loss of value against the public purpose served and the presence or absence of others similarly situated to share the burden. In *Agins v. City of Tiburon*[156] the Court upheld the development-restricting land use ordinances at issue and stated that:

> The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.[157]

In *Andrus v. Allard*[158] the Court considered a regulation that prohibited purchase and sale of federally protected birds. The court stated: "It is true that appellees must bear the cost of these regulations. But, within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.' "[159]

The earliest statement from the Supreme Court on regulatory takings is found in *Pennsylvania Coal Co. v. Mahon.*[160] In *Pennsylvania Coal* Justice Holmes stated that "if regulation goes too far, it will be recognized as a taking."[161] Justice Holmes' statement refers to the extent to which a regulation causes a diminution in property value. Justice Holmes also stated, however, that some diminution of value is permissible because the government would be hard pressed to continue "if to some extent values incident to property could not be diminished without paying for every such change in the general law."[162]

The means to determine the diminution in value that results from

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(1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

155. *Penn Cent. Transp. Co.*, 438 U.S. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

156. 447 U.S. 255 (1980).

157. *Id.* at 262.

158. 444 U.S. 51 (1979).

159. *Id.* at 67 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922)).

160. 260 U.S. 393 (1922).

161. *Id.* at 415.

162. *Id.* at 413.

government regulation is not based on fixed criteria.[163] Diminution in value, rather, is to be determined by the ad hoc inquiry announced by the Court in *Penn Central Transportation Co. v. City of New York*.[164] However, the Court has held that landowners are not constitutionally entitled to the most beneficial use of their land if other beneficial uses remain.[165]

To determine the impact of regulation on the value of property, courts also have given consideration to the investment-backed expectations of the owners.[166] The Court discussed investment-backed expectations in *Kaiser Aetna v. United States*,[167] one of the few federal cases in which the court found a taking. In *Kaiser* developers created a navigable pond by dredging a channel through a beach to a private pond. The developers built a marina on the pond. The United States Army Corps of Engineers sued the developers and sought to establish jurisdiction over the newly navigable waters and compel public access to the pond.[168] Allowing free public access to the pond presumably decreased the value of the development.[169] The *Kaiser* Court held that the government's action amounted to the deprivation of an economic advantage that was entitled to the protection of law.[170] The developers'

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163. *See* Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 901 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

> There is no fixed formula to determine how much diminution in market value is allowable without the fifth amendment coming into play. We are not cited to, nor have we found, cases comparing the owner's investment or basis with the market value subject to the regulation and applying any rule or formula with respect thereto, but we deem that a relevant consideration for exercise of a value judgment.

Id.

164. 438 U.S. 104, 124 (1978).

165. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) ("If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of most of its beneficial use does not render it unconstitutional.").

166. *See Florida Rock*, 791 F.2d at 900-01.

> [W]e have eschewed the development of any set formula for identifying a "taking" . . . and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. . . . To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action."

Id. (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986)) (alterations in original).

167. 444 U.S. 164 (1979).

168. *Id.* at 167-69.

169. *See id.* at 169 ("[P]etitioners had invested millions of dollars on the assumption that it was a privately owned pond leased to them.").

170. *Id.* at 178.

lost advantage thus required just compensation.[171]

A more fundamental inquiry in taking cases is whether the government regulation prevents a public harm.[172] A court may discuss this point explicitly, as in *Just v. Marinette County*,[173] or merely implicitly if it analyzes whether the government regulation substantially advances legitimate state interests. A judicial holding that the regulation advances a legitimate state interest, however, does not end the inquiry. Particularly in a due process analysis, a court may determine whether, all other factors militating against a taking, a taking nonetheless occurs because the government regulation confers a public benefit instead of protecting against a public harm at substantial cost to the claimant. The lower court decision in *Lucas* appears to be an example of a case in which this is a factor, though not the controlling one, and the supreme court specifically found that serious public harm was being prevented by the state's action.[174]

Like the United States Constitution, the South Carolina Constitution provides compensation for the taking of private property for public use.[175] The state constitutional provision reads: "Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."[176] A governmental taking of property, therefore, automatically gives rise to a cause of action for just compensation. No need exists for further supporting legislation.[177]

South Carolina can be characterized as a "property rights" state. In this regard, the South Carolina Supreme Court once indicated:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that the substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated, and ownership is ren-

171. *Id.* at 180.

172. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987).

173. 56 Wis. 2d 7, 10-11, 201 N.W.2d 761, 765 (1972).

174. *See* Lucas v. South Carolina Coastal Council, No. 88-CP-10-66, slip op. at 6 (S.C. Ct. C.P. Aug. 7, 1989), *rev'd*, ___ S.C. ___, 404 S.E.2d 895 (1991) ("[T]he Beachfront Management Act was enacted to preserve the state's beaches for the benefit of the general public.").

175. S.C. CONST. art. I, § 13.

176. *Id.*

177. *See* Chick Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 493-97, 157 S.E. 842, 847-48 (1931).

dered a barren right.[178]

The South Carolina Supreme Court has stated that under article 1, section 13 of the South Carolina Constitution no distinction exists between "taking" and "damaging."[179] According to the court the deprivation of the ordinary beneficial use and enjoyment of property is equivalent to a taking.[180] Almost all of the South Carolina cases for an inverse condemnation or taking by a government entity, however, have involved actual physical encroachment or other effect on the property. A case in point is *Rice Hope Plantation v. South Carolina Public Service Authority*.[181] In *Rice Hope Plantation* a diversion of the Santee River into the Cooper River caused previously fresh water adjacent to the plaintiff's property to become saline. Damages were awarded for the result.[182]

The supreme court also has held that property must be taken for a public use for compensation to be due. The court stated:

> The term public use is an elastic one and must keep abreast of changing social conditions, and the question is one of fact in each particular case. . . . As long as the use is of benefit, utility or advantage to the public, the use is a public one within the meaning of the law of eminent domain. Public health, recreation and enjoyment are recognized public uses.[183]

The court's language is particularly damaging because of the language of the Beach Management Act that focuses on the tourism industry and the recreational opportunities of the beach.[184]

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178. Gasque v. Town of Conway, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1940) (citation omitted) (overruled on the sovereign immunity issue in McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

179. *Id.* at 21-22, 8 S.E.2d at 873-74.

180. *Id.*

181. 216 S.C. 500, 59 S.E.2d 132 (1950).

182. *Id.* at 513, 59 S.E.2d at 136.

183. Timmons v. South Carolina Tri-Centennial Comm'n, 254 S.C. 378, 391, 175 S.E.2d 805, 812 (1970), *cert. denied*, 400 U.S. 986 (1971).

184. *See* S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1990). The Act indicates:

> The beach dune system along the coast of South Carolina is extremely important to the people of this state and serves the following functions:
>
> . . .
>
> (b) . . . The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;
>
> . . .
>
> (d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

In *Carter v. South Carolina Coastal Council*[185] the South Carolina Supreme Court found that valid police power regulation which prevents beneficial use of property can exist.[186] The court also has found that "the mere diminution in the market value of land by virtue of adoption of a zoning ordinance does not constitute a taking."[187] The South Carolina Supreme Court in the wake of the United States Supreme Court decisions concerning takings, however, clearly has shown that the threshold for beginning this analysis is very high. *Lucas* provides guidance for the cases being brought as a result of the Beach Management Act.

IX. CONCLUSION

The Beach Management Act of 1988 provoked legal, as well as political debate even before Hurricane Hugo ravaged South Carolina's shoreline. The United States Supreme Court has not ruled on what constitutes a taking under South Carolina's Beach Management Act, though the Act's effects have been challenged in both South Carolina state courts and in the federal courts. At least one case has a petition for a writ of certiorari pending before the United States Supreme Court.[188] Thus, not only can the South Carolina General Assembly amend the Act, but the United States Supreme Court might further outline and clarify the regulatory taking criteria.

Because of the fact-specific effect of the Beach Management Act on individual parcels of property, issues must be resolved on a case-by-case basis. Therefore, the Beach Management Act probably will result in an important line of cases that will significantly clarify and augment regulatory takings law in South Carolina.

Id. § 48-39-250(1).

The Act further provides that:

> The policy of South Carolina is to: (1) Protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:
>
> . . .
>
> (b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;
>
> . . .
>
> (c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors . . . .

Id. § 48-39-260(1).

185. 281 S.C. 201, 314 S.E.2d 327 (1984).

186. *Id.* at 204-05, 314 S.E.2d at 329.

187. Brabham v. City of Sumter, 275 S.C. 597, 598, 274 S.E.2d 297, 297 (1981).

188. Beard v. South Carolina Coastal Council, ___ S.C. ___, 403 S.E.2d 620, *petition for cert. filed*, 60 U.S.L.W. 3083 (U.S. July 16, 1991) (No. 91-137).